MICHIGAN SUPREME COURT

PUBLIC HEARING
January 27, 2010

CHIEF JUSTICE KELLY: Good morning ladies and gentlemen. It's good to see you here. This is the Court's public hearing this morning, and as you undoubtedly know, the public hearing is part of the Court's procedure to make sure that the public is informed and given an opportunity to respond to proposed rule changes that are under consideration by the Court. So this morning we have five items that are on this public hearing to which people have asked to comment. The first is 2005-13 involving court collections, and we're privileged to hear again from the Honorable Phillip Schaefer. Judge Schaefer.

ITEM 1 - 2005-13 - Court Collections

JUDGE SCHAEFER: Thank you very much. Madam Chief Justice, fellow Justices. My name is Phillip Schaefer. I am a retired circuit court judge from Kalamazoo County, having served there for 21 years. And it was my honor and privilege to chair this committee; a committee which was created in the year 2005. This has been a long journey, and before I forget normally Beth Barber who was the SCAO person - principal in charge internally in this project is, I think as you know, is not here today because of an accident that her husband was in, and I think that he's having surgery today. So she will not be here and so I'm kind of gonna try to answer any questions that you have both from the proposed rule and the actual implementation of it if it is adopted.

I think you're aware of the process that we used. When we got started in this two states were involved in court collections, primarily Texas and Arizona. Arizona chose to follow a path that addressed court collections through the application of hardware and software processes. And their principal concern was in I believe Maricopa County, which is a very, very large county, Phoenix, and a number of other communities are involved in that. Texas on the other hand eventually elected to take the approach that that we did and that is we went to the people, and we went to the users. We went to the people who would be primarily affected by this on the judicial side. We went to the county clerks. In each of the regions we created subcommittees, the public officials,

judges, court staff. We conducted hearings. We meet frequently in Lansing. At times we brought all of the committees together to brainstorm, and essentially we concluded that the best approach to the topic and the issue of court collections is to allow local courts within certain guidelines to develop their own programs. If they are able and wish to use software, fine. Keep in mind that these regional committees represented not just judges; it represented prosecutors, it represented attorneys, it represented county clerks, it represented the people who come into contact with our courts and with whom we interact on a regular basis because they are as much a stakeholder in this process as is the court.

And what we ended up developing was basically ten key components. Are the ten components the perfect program? Well, it's certainly a good start, but, again, keep in mind this whole approach of collections is anchored in our own court rule, MCR 1.110, which talks about collection of the fees and when they become due and payable. And we concluded that the best approach is one which allows local units of government, local courts, to corroborate with one another - collaborate with one another, and to develop programs of collection that meet certain criteria. How the courts do that is entirely up to them, and up to their local unit. And so we developed these ten key components. We suggested as a start at least seven of them be used as a beginning. Now I know there's been some concern that this may require additional costs, or it may require additional programs to be developed. I can tell you in Kalamazoo County that has not been the case. We simply allocated staff to address this. This is - this whole approach to collections is really I think an effort to develop the culture, or what I like to call compliance and accountability. Far too - Far too often people who come into our courts come in with an indifferent attitude and walk away with the same, without an appropriate respect for the rule of law. And what this allows is interaction; these key components are pretty simple. You have them; they're just simply that we will adhere to MCR 1.110, and have an expectation of payment, everything revolves around that. We verify information that they give us in the event they cannot pay. In the event someone absolutely cannot pay, we allow for alternative processes like community service in lieu of payment. We monitor them for compliance, and we report the results to SCAO.

CHIEF JUSTICE KELLY: Let me interrupt you, sir, just to ask.

JUDGE SCHAEFER: Sure.

CHIEF JUSTICE KELLY: Do you support the recommendation that the Court authorize the pursuit of legislation to establish statutory authority to impose a time payment fee for those who do not or cannot pay the costs - the court costs and fees that are imposed on them at the time of disposition?

JUDGE SCHAEFER: That was one of our recommendations, yes. And the principle behind that was that in the - that event more staff is necessary to continually monitor these things, that that may be a source of funding.

JUSTICE YOUNG: So you want at least the possibility of having a dedicated source of funding from this whole process in order to underwrite some of the additional cost of (inaudible).

JUDGE SCHAEFER: That was the thinking, correct.

JUSTICE WEAVER: Have you talked to -

JUSTICE CORRIGAN: Can I ask -

JUSTICE WEAVER: Excuse me. Have you talked to the people in Kalamazoo, do they still have staff allocated - because you're now retired a couple of years, huh?

JUDGE SCHAEFER: I'm sorry - did they -

JUSTICE WEAVER: You're retired aren't you, a couple a years? When did you retire? Are you still sitting?

JUDGE SCHAEFER: I forget - about two years ago.

JUSTICE WEAVER: Well, I remember you and I were on the campaign trail -

JUDGE SCHAEFER: That's right, in Kalamazoo.

JUSTICE WEAVER: You know, I'm still here, you're not. The - what I was just wondering is is whether you still sit in Kalamazoo sometime as a retired judge, and whether you have talked with them. Because in the last two years - of course, there's been a lot of cutbacks, and I don't know whether there've been any Kalamazoo, but this is for 83 counties. So for some counties it may be - they need not additional staff - they may need staff. That's my only concern about this is -

JUDGE SCHAEFER: I appreciate -

JUSTICE WEAVER: You know what I'm talking about. And do you think perhaps we ought to get the Legislature to pass the fee bill before we put this into affect - pass it contingent upon the Legislature giving the fees - the time fees. I just want to know what you think about all of that.

JUDGE SCHAEFER: Well, I think that the Legislature should be approached on that to be sure. But I also think that our pilots have demonstrated that courts are able to begin this process of accountability without new staff, without new hardware or software. It is inculcating a mindset in the people who come into our courts. I saw that change over time, over my years on the bench, people would come in and say yeah, okay, I'll pay that when I can pay it, and you never see them again. Little by little through the collections effort, people are receiving the message from the very beginning; we will have certain expectations of you. They hear it again, and again, and again. It doesn't mean somebody goes to jail because they haven't paid, but they know what our expectation is and they know that we will follow through on that. In Kalamazoo County, I do not believe any new staff was hired, and I think the collections efforts have been very satisfactory.

JUSTICE WEAVER: No, I wasn't asking if new staff was hired, I just wanted to know is whether they haven't decreased staff and for some reason drop this. I'm not saying that. It's just - I am all for this. I instituted this when I became a probate judge in Leelanau County - elected in '74 - and did on my own begin collections. So it's not that I'm against it. I just know that this is 83 counties, 256 courts. So I'm interested - and that would be a question that's being asked that I convey to you to give you a chance to answer it.

JUDGE SCHAEFER: Our experience has been the opposite. Now will there be courts that may incur additional funding; that's possible, but we can address those on a court-by-court basis I think.

JUSTICE WEAVER: Well, it's important to know whether the fee - time fee is important, and not well we can do it anyway or - I think you mentioned there were ten or seven things. If the Legislature thinks oh well, you know they can do it anyway, I don't see them moving on it.

JUDGE SCHAEFER: Part of our recommendation is that we move on the legislation because they do eventually work hand in hand; the point is we need to get started.

JUSTICE WEAVER: Yeah.

JUDGE SCHAEFER: And we need to start that culture of expectation from - from our side of the bench going to people who appear in front of us.

JUSTICE WEAVER: Now you said there was seven things that should be immediately instituted, is that correct?

JUDGE SCHAEFER: Those are the -

JUSTICE WEAVER: Or ten?

JUDGE SCHAEFER: Those are the first seven of the ten key components that we believe are important for a successful collections program.

JUSTICE WEAVER: And what are the three that you don't feel -

JUDGE SCHAEFER: Okay. The three are - Well, the three turn up the heat a little more.

JUSTICE WEAVER: Okay.

JUDGE SCHAEFER: Number 8 talks about bench warrant issuances and things of that sort. Number 9 - use of locator services. And number 10 is a referral to outside agencies for collection. So those are more or less extra judicial steps that are certainly part of successful collection programs that we've seen.

JUSTICE WEAVER: Well, I certainly appreciate all the work you've done, and it's certainly a wonderful - it's the right idea for people to be held accountable and responsible for their obligations.

JUDGE SCHAEFER: I'll tell you what was most refreshing was the interaction with local units of government - the counties. There's a sense that the judiciary is out there somewhere, and it brought a human element. They saw us as people and we know them to be people, and so it was - it was an exciting venture for me personally.

JUSTICE WEAVER: Well, thank you for doing this.

JUSTICE CORRIGAN: Let me add my thanks to those of Justice Weaver, and I'm sure all of us for the work. I had sent a memo last Friday and I had a few specific questions, and I'm not sure whether my memo made its way to you. But may I lodge a couple of questions to you?

JUDGE SCHAEFER: You may.

JUSTICE CORRIGAN: One thing, it seemed to me that the thrust of the public comments that we received was all around certain misperceptions about requiring additional staff or additional sources of funding, and I was concerned that that perception be addressed in whatever staff comment is issued. And let me just say I support the adoption of this proposal, but I'm concerned that - at the edges, at the margins, that we answer some of the concerns. And I was hopeful that the staff comment would take a look at that first.

JUDGE SCHAEFER: I think our clear philosophy has always been if you can get a program started without hiring additional staff, number one it's possible, and number two you should do it, very clearly.

JUSTICE CORRIGAN: One - I thought that the letter from the Association of Court Administrators raised some really good points, and that - for example, when we write standards that say that collections staff should use - and I quote - "all available resources to locate litigants," they were concerned about that raising audit potential down the road. And that - I mean it seems like it makes us susceptible to - to that very problem -

JUDGE SCHAEFER: Yeah.

JUSTICE CORRIGAN: and I'm wondering whether that could be tempered somewhat.

JUDGE SCHAEFER: Clearly - you know when we write all these words down on paper the word all is not intended to be the literal of all, but that we examine all locator services and choose the one that's most appropriate for our use.

JUSTICE CORRIGAN: Okay. So that - there might be some modification of -

JUDGE SCHAEFER: Absolutely -

JUSTICE CORRIGAN: Okay.

JUDGE SCHAEFER: no question about that.

JUSTICE CORRIGAN: All right. And finally, I had a separate issue with regard to restitution and I'm glad that there's an effort to approach the Legislature, but - I mean it seems to me through the years that we've had huge issues collecting restitution for victims and that's gone untouched and of late publicity is showing that we're lucky if we collect you know 10% of what's owed. And I'm wondering in the future deliberations of the collections committee whether they might carve that out and think about whether there might be a statutory approach to our Legislature that would authorize a separate look see at restitution to see whether you know if our Constitution protects victims. We have a statutory scheme of victim rights, and yet the restitution piece seems to be lumped in with the rest, and I just wonder if we could do a little more to carve that out so that the - we do a better job about collecting restitution and other branches of government might be accountable in that regard not just us.

JUDGE SCHAEFER: Well, and - and I think also what we've learned through this process is that we need - we need to do a - perhaps a more refined job of reporting what those numbers mean. Obviously, if someone commits a heinous crime and is sentenced many, many years to prison, the probability of collecting is pretty remote unless that person has resources outside of what we normally see. To be sure, we will never collect 100 cents on the dollar; there's no question about that. We know we can do better; we need to start somewhere. And this - this theme has resonated throughout the state; it has resonated at the grassroots level. When we created our subcommittees, we did not have one person, to my knowledge, refuse to serve on a subcommittee of our collections. We had county clerks, we had other local officials, we had judges, we had court employees. Some of you were here when they were here. You may have seen the seminars that we've had in this building, and a luncheon that we had. There is tremendous enthusiasm for this project. It extends from the southeast corner of our state all the way to the western tip of the Upper Peninsula. Judges and court staffs want to know that they have the support to advance collections; it has been overlooked far too long. And our pilots show that we can talk about that some monies that will never get collected and that we know is gonna happen. But I'm often reminded of the

gentleman in Kalamazoo who had amassed something like $100,000 in parking tickets - totally ignoring, brought into court, and ended up paying $400 a month toward paying off those parking tickets. Now he happened to be in a well employed position, he didn't need a lawyer, he needed to be held accountable. And that's what collections in the final analysis is as much about as anything else. It's respect for the rule of law. And this message - I - you know I've been honored to serve in this position, but this message is resonated with the various associations that have heard it, and I think it is important. Michigan is leading the nation in this.

CHIEF JUSTICE KELLY: Thank you, judge.

JUDGE SCHAEFER: Thank you.

CHIEF JUSTICE KELLY: We appreciate your work on this. The Court will be acting on this proposal at its administrative meeting in the courtroom after the hearing concludes. The next item is 2008-21 which involves a file that was opened to consider whether to eliminate or limit the consent calendar rule set forth in MCR 3.932(C). And speaking for us today - before us today will be four people. First is Kimberly Thomas.

ITEM 3 - 2008-21 - MCR 3.932

MS. THOMAS: Good morning. Good morning Chief Justice Kelly and the Justices of the Michigan Supreme Court. Thank you very much for the opportunity to speak today. My name is Kimberly Thomas, and I'm the Clinical Assistant Professor at the University of Michigan Law School. What that means is that in addition - and I specialize in criminal and juvenile justice law - so in addition to my academic interest in these issues, I also supervise law students in local trial level juvenile justice courts. And those students have handled - do practice in Genesee, Wayne, Washtenaw, and Livingston Counties. So in addition to my academic prospective, I have some experience that I hope to bring to the Court in the practical application of these rules. Of course, this Court is familiar with the history of the juvenile court and its founding as a court distinct with the distinct purpose and history than the criminal courts, and that distinct purpose and history is for the rehabilitation of young people prior to their adulthood. And I think that that is the context in which this - an important context to remember when thinking about these proposals. I would oppose the proposals to both alternatives A and B for the following reasons. Nationally juvenile courts do divert and send children

from the formal calendar to the informal calendar. Nationally the numbers are about 26% of children are put on some sort of informal or diversionary program out of the children that are - that enter into juvenile court. The options other than the consent calendar in Michigan are, frankly, relatively limited. There's the Juvenile Diversion Act which you're familiar with, and in practice that's seen as a very limited option in a lot of the courts at least that I practice in. This is true even when compared to the diversionary options available for adults. Of course, this Court is familiar with the Holmes Youthful Training Act. Also, prosecutors have programs. Courts, under this Court's court rule, can take pleas under advisement in adult court, and that can result in a dismissal of a plea in a very similar fashion to the function of the consent calendar.

JUSTICE MARKMAN: Ms. Thomas?

MS. THOMAS: Yes.

JUSTICE MARKMAN: Can I ask you a question, please?

MS. THOMAS: Sure.

JUSTICE MARKMAN: This has been a very hard issue for me. It appears from the responses that we've received and based upon things that people like yourself have said, that this process has worked very well. It's an important process for resolving matters of juvenile misbehavior, and I think it's been a very effective process from what I can see. The only issue, the only stumbling block, is the constitutional question to me. And the only aspect of the constitutional issue to me is what exactly is the constitutional right of a prosecutor under our system of separation of powers? If the right of the prosecutor is simply the right to bring a charge, I think that that's satisfied by the consent procedure. Arguably, however, the right of the prosecutor goes beyond that, and the right of the prosecutor specifically, that is the right of the Executive specifically, is to bring a charge and to have that charge resolved substantively by the criminal justice system. It can resolved by a dismissal, it can be resolved by a conviction, but the charge brought by the prosecutor has to be resolved, and it has to be resolved on the basis of the law as it exists at the time the prosecutor brings the charge. My concern is that if the latter is the proper understanding of the prosecutor's role under our Constitution, the consent procedure does not necessarily seem to be compatible. Can you address that very specifically?

MS. THOMAS: Sure, Justice Markman. I would say out front that I looked into this issue in the context of my expertise; I am not a constitutional - you know there are other faculty members who I would refer you to if you wanted the end all and be all constitutional analysis so let me just frame it in that. But I did give quite a bit of thought to this question, on this issue. I do think that the primary function of the Executive in this context is to bring charges, and that function is not interfered with by the consent calendar. So, for example, it would clearly be unconstitutional if part of the consent calendar proceeding the court could put the child on a consent calendar on a lesser charge - all right. So we have *Genesee* you know those line of cases, and that would be impermissible. So we know that there are lines of -

JUSTICE MARKMAN: Do you know - are you aware of any other aspect of our criminal justice system in which the prosecutor can bring charges, but is not guaranteed a resolution of those charges based upon the laws that exist at that time?

MS. THOMAS: Well, potentially the plea under advisement proceeding. I mean a prosecutor could bring a charge, a plea could be made, and the court could take that under advisement. It wouldn't result in - in the adult context - a criminal conviction. Just as in the juvenile context, something that's placed on the consent calendar receives treatment in the rehabilitative services, but it doesn't result in a juvenile adjudication.

JUSTICE MARKMAN: But under the youth - the training act - the Holmes Training Act, doesn't there have to be a plea - a guilty plea?

MS. THOMAS: Under the Holmes Youthful Training Act, yes, there does (inaudible).

JUSTICE MARKMAN: So it's resolved - it's at least resolved temporarily; the prosecutor gets the resolution of the case, does he not?

MS. THOMAS: Well, I guess it depends on what you count as a resolution; a resolution that is a conviction, no.

JUSTICE YOUNG: But the statute does provide - That is a legislative determination of how to resolve the charge; that is

not the court by its own rulemaking authority attempting to create an exception to the prosecutorial authority.

MS. THOMAS: That's correct, Justice Young, which is why I referred to the plea under advisement court rule as perhaps a more analogous situation.

JUSTICE YOUNG: But that's a court rule. And in addition to the concern that Justice Markman has raised about the separation of powers issues, we have a legislative determination in MCL 722.823(3) that precludes diversion of minors for assaultive crimes and - So I'm - I've got two levels of concern. One is the concern Justice Markman has raised, and we have an explicit statutory statement from the Legislature that juveniles who committed certain kinds of crimes, serious crimes, cannot be diverted. And your argument is, but it works -

MS. THOMAS: No.

JUSTICE YOUNG: and it's a good policy. And I don't understand what - and I'd be interested, do you tell your students that good policy trumps the law and constitutions?

MS. THOMAS: No, Justice Young, of course not.

JUSTICE YOUNG: Well, tell me why the statutory preclusion on diversion and Justice Markman's concern about the constitutional separations aren't insurmountable problems from this Court exercising its procedural powers to effect substantive changes both in the statutory nondiversion standard, and encroachment on the prosecutorial function?

MS. THOMAS: With respect to the Juvenile Diversion Act, that statute prohibits a child from being diverted on an assaultive offense under the procedure set forth in that Act, which is diversion and referral to a private agency for a supervision by that private agency of whatever services that agency provides. That is a different procedure and a different diversionary program essentially than the consent calendar. The consent calendar remains within the court system, there's no referral to a private agency, and so there's no limitation in that statute on including assaultive offenses within the consent calendar.

JUSTICE YOUNG: You don't think there's an inconsistency then. When the Legislature says this - there's a certain set of crimes we want juveniles to be held to a higher standard of

accountability, you still think the court can in affect ignore that directive and create a process where those same kinds of crimes do not result in an adjudication.

MS. THOMAS: Yes, because it's a distinct procedure and it's, frankly, a more intensive procedure and it's a more court supervised structured procedure. I would also point the Court to - the Legislature clearly has seen how this functions in operation, so in Michigan law 780.786(b)(1), part of the Crime Victim's Rights Act, provides the juvenile shall not be diverted and placed on the consent calendar, and that's the language in the statute, right. So the Legislature knows that young people who commit assaultive offenses are being placed on the consent calendar, and the Legislature tells us that we need to comply with the Crime Victim's Rights Act when that happens. The Legislature doesn't tell us that you can't do that. So they know what's being done, and they've said if you're going to do that then you have to provide notice and an opportunity to be heard to the prosecutor and the victim, that's only fair, and that's exactly what should happen in these cases.

JUSTICE YOUNG: Can I ask a policy question then since you think there's this - a range of policy available to the court to decide. What would be inappropriate if consent calendars continue to be available for assaultive crimes committed by juveniles from requiring that the prosecutor approve that?

MS. THOMAS: As a policy matter, or as a legal matter?

JUSTICE YOUNG: As a policy matter.

MS. THOMAS: Okay. I mean I think there's - there's some legal argument though I think pretty sketchy that that shouldn't be permitted as a separation of powers issue. So in thinking about Justice Markman's question I tried to find an analogous situation where someone had challenged it on those bases and was not able to. I was able to find a few challenges where the prosecutor had to agree to it, and that was challenged as a usurpation - and I'm not sure that's a word -

JUSTICE YOUNG: Yes, it is.

MS. THOMAS: and taking away the court's power.

JUSTICE YOUNG: But we - we are free, obviously, to limit the court's power.

MS. THOMAS: Right.

JUSTICE YOUNG: My question is given the -

MS. THOMAS: Why not?

JUSTICE YOUNG: constitutional concern, particularly given the Legislature's expression of concern about diversion of serious juvenile offenders, why isn't that at least a compromise that preserves at least the prosecutorial prerogative?

MS. THOMAS: So - I don't think it's a - it's a - as a policy matter a good idea to have a prosecutorial veto because I think there are other persons within the court system that can make a equally, if not better, informed judgment about whether the child in the situation is appropriate for referral to the consent calendar; specifically, juvenile court officers. I mean they have a lot - probably the most information of anyone in the system. They have extensive contact with the children, and they have extensive awareness to the services that are available, and can make good recommendations to the court that may or may not - and I think in most cases let's be honest it's - most cases - everybody's on the same page in these, there are very few cases where the prosecutors don't agree with the recommendations that are made.

JUSTICE YOUNG: And mox nix.

MS. THOMAS: But what?

JUSTICE YOUNG: And mox nix. If most of these result in agreement with the prosecutor and the juvenile authorities, why wouldn't we allow the prosecutor to have an oar in this?

MS. THOMAS: Because it's not necessary, and in some cases it's the -

JUSTICE YOUNG: I understand your argument.

MS. THOMAS: Yeah. I mean -

JUSTICE CORRIGAN: Could I shift to another area of questioning, Ms. Thomas.

MS. THOMAS: Sure.

JUSTICE CORRIGAN: Many of our commenters here have talked about the great success of the consent calendar, and our staffs response to that is really we have no way of knowing that because consent calendar case information is maintained by individual courts, it's not accessible to us, it is not accessible to other courts, so how do we even know here when we're tracking and we count cases here - we attempt to do that - how can we really say that the consent calendar succeeds -

MS. THOMAS: I don't think -

JUSTICE CORRIGAN: without - without the data.

MS. THOMAS: I think statistically you can't say that at this point.

JUSTICE CORRIGAN: Okay.

MS. THOMAS: I think that unfortunately at this point the Court has to rely on -

JUSTICE CORRIGAN: I mean it's a - you know judges may say in individual counties well I know that worked you know but they don't - without the data to say was so and so arrested in another county you know a year after we destroyed all these files, we don't know that do we?

MS. THOMAS: No. I mean as an empirical matter, I don't think we have the answer to that. As a - you know in the law of averages -

JUSTICE YOUNG: This is apparently a heuristic argument -

MS. THOMAS: Excuse me.

JUSTICE YOUNG: This is entirely a heuristic argument; there's no data, it is just an assertion of fact that the diversion through the consent calendar is a greater good - accomplishes a greater good; we have no data to support that.

MS. THOMAS: Well, I think - I think what we do know is that many, many young people commit one offense and that's it.

JUSTICE YOUNG: We don't know that.

MS. THOMAS: Not - not - as a general matter we do.

JUSTICE YOUNG: And where do I look to find - to validate -

MS. THOMAS: I mean I could try to find some you know studies and submit an additional comment, but as -

JUSTICE YOUNG: The fact is we don't know how these youths when they are diverted through the calendar process actually perform because they aren't tracked, we don't even know that if a youth in one county is diverted they actually are - onto the calendar - and they commit another crime in another county we don't have the capacity presently to know that that same youth has committed two offenses.

MS. THOMAS: Well, that's an - that's a separate problem I mean that could be -

JUSTICE YOUNG: Well, but it goes to -

MS. THOMAS: that could be fixed.

JUSTICE YOUNG: the core of your argument that these calendar diversions are working.

CHIEF JUSTICE KELLY: Well, you're indicating that we do know some things.

MS. THOMAS: Well, we do know some things because we know about patterns of childhood offense - child - children committing offenses, right, and many child - children commit one offense for which they're punished and given consequences which is what the consent calendar is set up to do, and then they don't offend again. So statistically -

JUSTICE YOUNG: How do we know that? How do we do what you have just asserted?

MS. THOMAS: Statistically we know that a lot of kids just commit one offense and so I don't have those numbers, but I could submit them.

JUSTICE YOUNG: Statistically - I work with abused and neglected children; statistically they commit a lot of crimes for which they're never charged, they usually are diverted into some kind of program to help the underlying problem, but I - I'm not sure I see anything on my empirical understanding of how children who are abused and neglected who commit crimes that

suggests that this a one episode or for the vast majority of kids who commit crimes.

MS. THOMAS: I wouldn't feel comfortable saying what percentage I think that accounts for -

JUSTICE YOUNG: Particularly, if a child commits a serious assaultive crime.

JUSTICE CORRIGAN: The way we've got it working in Michigan right now, for example, you know Judge Moore in Oakland County could divert a child and Judge Garagiola in Livingston County could divert a child, those two you know wouldn't even know because we don't track data from county to county how many times that child is diverted out, and we don't even access to that data since it is county specific. And - I mean there's - there's just so many problems in the way this is working.

MS. THOMAS: Yeah. So I think there's a - the problem of information about the counties talking to each other is a separate problem from whether or not the consent calendar works, and whether it's a) a good idea and b) constitutional. I think that's a separate problem, not -

JUSTICE YOUNG: But the premise of your argument is that it does work, and that should drive the decision about how this Court should address the calendar - consent calendar.

MS. THOMAS: It does work because as a practical matter, kids aren't moving - most kids don't move from county to county, they stay in the same county, and then the courts would know whether they're coming back or they're not coming back. I mean as a practical matter that's what happens.

JUSTICE MARKMAN: Professor Thomas I at least am prepared to accept that it works; I'm prepared to accept that on the basis of the overwhelming response that we've gotten from people on the frontlines. I agree that there's not a lot of empirical evidence, but just for the sake of discussion I'm prepared to accept that it works. But I don't want to let you get off the Constitution argument too quickly. If this Court maintains the consent procedure, it seems to me we're necessarily saying what you said earlier that the constitutional right of the Executive is to bring charges and that's it. Assuming that one believes the constitutional right of the Executive, in this case the prosecutor, is a broader right than merely the right to bring charges, by accepting the current consent procedures we're

necessarily deciding that that is not correct, that the constitutional right is as you say it's merely the right to bring charges. Should this Court be making that very significant constitutional judgment at this juncture when we don't have any argument back and forth as to what the right of the prosecutor is?

MS. THOMAS: I think the courts of the state have already made the judgment about what the role of the prosecutor is. So we have *People v Konape* (phonetic) -

JUSTICE MARKMAN: You're making policy judgments.

MS. THOMAS: We have - No. *People v Trinity*, we have the *Genesee Prosecutor* cases. We have cases -

JUSTICE YOUNG: What does the *Genesee Prosecutor* case say about the constitutional right of the prosecutor in terms of whether it's merely the right to bring charges, or it's the right to have those charges resolved?

MS. THOMAS: So there -

JUSTICE MARKMAN: What does *Genesee* say about that specific constitutional issue?

MS. THOMAS: So there it does focus on the charging decision, right, so maybe - maybe that doesn't extend as far as you'd like it to. I think maybe *People v Trinity* which is a Court of Appeals case -

JUSTICE MARKMAN: No, that's - I'm not urging one resolution or another; I'm simply pointing out that if we maintain the procedure we're resolving the constitutional issue as you favor. We're not necessarily - we're rejecting a broader understanding of the prosecutor role. Should we be doing that in the absence of any legal and constitutional argument as to what the Executive's right is under the federal and state Constitutions concerning their executive functions?

MS. THOMAS: Justice Markman, respectfully, I don't think that by retaining the court rule as it it defines the prosecutor's role necessarily in such a narrow fashion. So I guess that's where my resistance.

JUSTICE MARKMAN: Why doesn't it necessarily do that?

MS. THOMAS: Because I think that there are other functions that the prosecutor has not necessarily reduced to charging that are established - I mean the prosecutor's constitutional role that - whose duties are defined by the Legislature, and so those are open to the Legislature - So I don't think it is quite as narrow as your -

JUSTICE MARKMAN: But that's the whole point. If we're saying the Legislature can resolve that matter, or the courts can resolve that matter, we're saying there is no constitutional right. That's the necessary corollary of that, isn't it?

MS. THOMAS: Well, I think that the point I'm making is that however we define the scope of the prosecutor's role, and I would resist the - the sort of narrow scope that you've defined it as that the -

JUSTICE MARKMAN: I didn't define it -

MS. THOMAS: judiciary role -

JUSTICE MARKMAN: I said you're defining it that way. You're the one defining the role of the prosecutor narrowly as encompassing nothing beyond the right to bring charges. I'm asking whether or not your characterization of the Executive role is correct or not, and whether or not we ought to be resolving that necessarily in the course of accepting the consent procedure.

MS. THOMAS: Your honor - I don't think that the resolution of this question resolves that. I think that the scope of what the judiciary is doing in the consent calendar is clearly within the judicial function, and so I don't think that by making this decision you're doing that. So I guess that I - that's where I'm (inaudible).

JUSTICE MARKMAN: You don't think by doing this decision we're necessarily saying the prosecutor does not have a right to have the charges that he or she brings resolved on the basis of the law at the moment that he brings those charges.

MS. THOMAS: I guess I just wouldn't define it that way, and I do think that the charges are resolved. The prosecutor's bringing these charges; they're involved in the process. If the child fails on the consent calendar, they go forward on the formal calendar just like every other case, and that that role isn't constrained significantly by the consent calendar

procedures. So I mean I guess that - I'm not sure that's responsive to - I don't think that this Court is doing anything additional than the courts of this state have already done in defining the prosecutor's role. I think that this is within the scope of those cases that define the role of the prosecutor, and you know that's - that's what I'm left with. I mean I don't -

JUSTICE MARKMAN: Well, you cannot point to any other realm of the law in which the prosecutor's function is - is as limitly - limitedly understood as your understanding in this context. I think Justice Young puts the issue perfectly correctly. Are we gonna resolve this on the basis that this is a good procedure, it's worked, the trains have run on time, or are we gonna try to consider in that calculus whether or not the Constitution defines the prosecutor's role that way or not.

MS. THOMAS: So then we come back to *Haida* (phonetic) for example. You know our courts have said that there's no infringement on the prosecutor's function by the Court dismissing cases under *Haida*. This to me is an analogous situation -

JUSTICE MARKMAN: Because there's a plea in *Haida*.

MS. THOMAS: Well, as - you can have -

JUSTICE MARKMAN: Not an insignificant distinction; there's a resolution in *Haida*.

MS. THOMAS: Well, what happens in a consent calendar case could be one of two things. Either the child makes an admission, not a formal plea but an admission to the court about what happened as an entry into the consent calendar program, or the court places the child on a consent calendar after a plea has been made when they're making a dispositional decision. And so some of these cases result in what are formal pleas prior to entry on consent calendar. So I don't know if that satisfies the Court, but that is what happens. And some of them do not, but are you know statements of admission I guess for lack of a better term.

JUSTICE MARKMAN: Thank you.

CHIEF JUSTICE KELLY: Thank you, Professor.

MS. THOMAS: Thank you.

JUSTICE WEAVER: I want to say something. Go back to the issue of whether the - this idea that diversion works or not. I was a probate judge in Leelanau County for 12 years. Leelanau County was 14,000 then, has grown to 22,000. We handled every case that the prosecutor ever brought in some way or another, and we had huge preventative and diversion programs. We did track recidivism, and the point you made is that most of these kids do not move. And so we followed them through the court - through our system, through the district court system if they got there, through the circuit court system if they got there. And there's some things that you don't have to prove by data - common sense tells you it's either working or not if you have the information. I can guarantee it worked in Leelanau County to have diversion. And we had total cooperation with the - we had very few assaultive crimes, but we did have felonies, and for Judge Schaefer's benefit I wanted to tell him when he said that you'll never collect all the restitution, or all the what have you. In Leelanau County, we would have the breaking of glass windows that would amount to thousands of dollars - we collected it all. We collected a lot of restitution, and we had them do community service regularly. We had the total picture of working with the communities, having the schools involved, all the social workers, the whole people that are involved in the juvenile justice system, and that's the police also, and the prosecutors. We met every six weeks to two months for the committee to know what was going on. And to this day when I go into Tom's Market I still see kids that were in front of me. They think they had a big A on their chest, but they didn't, and they never got back in. There are those who were prosecuted and they did get into the system, but that was not the great amount. We had - I don't remember statistics now but like 75 or 80% success rate in dealing with the cases early. Now Leelanau County has that and continues to have that advantage that some of these bigger counties don't, but they're still trying to do the same thing - catch these kids early. So on those issues I think it would not be worth it to get into the statistical data that some of my colleagues think you have to have in order to know whether something works or not. Furthermore, with respect to the assaultive issue, I'm gonna be interested to hear from some of these other - I see we've got a prosecutor on here and I see him back there - I want to hear what he's gotta say.

MS. THOMAS: Thank you, Judge Weaver.

JUSTICE WEAVER: Thanks.

CHIEF JUSTICE KELLY: Thank you, Professor. Next on our list here is the Honorable Susan Dobrich who is a judge of the Cass County Probate Court and the President of the Michigan Probate Judges Association. Judge Dobrich.

JUDGE DOBRICH: Good morning, Chief Justice and Justices of the Supreme Court. Thank you for this opportunity. I have submitted two separate letters, one that addressed policy, and hopefully one that addressed the principal issues presented today and - of the discussions and that is the separation of powers argument.

I want to begin as I listened to your questions from the last speaker so I've changed some of my presentation. I'd have to agree that there is a lack of uniformity through the 83 courts, and perhaps this lack of uniformity has caused some issues among the Justices today. I also think we have anecdotal information but we haven't tracked this statistically, but I do believe that that's possible, and which is one of the recommendations that we made is to form a task force to look at alternative dispositions for minors which the State Bar has joined in that request. I think there are additional policy reasons that haven't been discussed, and one is the economic realities of Michigan with dwindling resources and dwindling number of judgeships that will be available in the future. The number of cases that are being presented to family court is astronomical. Oakland County had 450 consent cases as Judge Moore reported, and in Berrien the diversion and consent calendar - because those are two separate things I want to discuss - is over 50% of the cases. In addition, many of us receive grant money through balance and restorative justice programs, and these grants are administered by the Department of Human Services through the department - from the Department of Justice with the focus on diversion and consent so many of us have monies that are also tied to this. The consent calendar began when I was still in junior high school, and was adopted in 1969. It remained the same effectively until 1988 when it was changed to allow the case to be transferred back on to the formal calendar. The purpose behind this is the victim's rights movement during the '80s - in 1988 the Victim's Rights Act was adopted. And I'm gonna discuss that in a moment, but that was the driving force in changing the consent calendar to allow this case to go back to the formal process if the youth was not successful. It's important to understand that consent is not diversion; it's a different thing. It's a process - it's an informal process after an authorization of a petition; where a diversion occurs before a petition, it can actually occur by law

enforcement. Under the consent, we have a treatment plan with rehabilitation, and if the juvenile is not successful it's placed back on the formal calendar. Now the case of *In re Williams* that Justice Corrigan's dissent - and I've spent a lot time reviewing that, and I think Justice Corrigan was correct that the trial judge abused her discretion in putting that matter on the consent calendar for several reasons. One is because they already accepted a plea. And second, because of the basis in which they put it on the consent calendar, and that was a disagreement with legislative policy in the state of Michigan. So it was clearly an abuse of discretion. I disagree that there's a separation of powers argument in the *Genesee I* and *II* cases, talked the ability of the prosecutor to make the charges in a case, and if I recall *Genesee I* correctly, that involved a case where the prosecutor charged possession of stolen property, a five-year felony, and the circuit judge decided to take a plea on joyriding. And *Genesee II* I think is a case where the prosecutor authorized a charge of murder - first-degree - and the circuit judge decides to take a plea to a manslaughter. Now I understand the distinction that Judge Markman was - or Justice Markman was making in regards to the ability of the prosecutor is more in charging, and I think that's true in the criminal justice system, but in the juvenile system the purpose of the consent calendar was to allow a process and that only establishes a process of whether the case was going to be handled formally or informally. If the juvenile fails on the informal process, the matter's put back on the formal calendar where the prosecutor can proceed with the original charge, and that's the reason in which a plea is not taken, but there is a formal process under the consent calendar.

At the same time that the consent calendar was amended in 1988, the Michigan people proposed the Victim's Rights Act which is part of the Constitution, and pursuant to that the Legislature amended the Victim's - or readopted the Victim's Rights Act and made changes to reflect the need of the juvenile justice system to be responsive to our victims in the state of Michigan. And I specifically want to quote under the Crime Victim's Rights Act, MCLA 780.786(1) "requires the court to accept a petition, the court has no authority in regards to whether the petition will be accepted or not, submitted by a prosecuting attorney seeking the court's jurisdiction." The only thing that the court has the authority of is to determine whether there's probable cause which would be the equivalent procedure as there would be in a criminal case. The next section of the Crime Victim's Rights Act requires - requires that we give notice to the prosecuting attorney of - or the

prosecuting attorney - excuse me - requires the prosecuting attorney to give a notice to the victims and the possibility that the case can be dismissed, waived, or pretrial diversion. But most specifically under MCLA 780.786(b) the Michigan Legislature in adopting legislation in regards to the new constitutional provision of the Crime Victim's Rights indicated that a juvenile shall not be diverted, placed on the consent calendar, so they recognized that there was two separate procedures, or made subject to any other pre-petition or pre-adjudication procedure, so they also recognized perhaps some of the lack of uniformity in the courts without providing an opportunity for the prosecuting attorney and thus the victim to present why this case is not appropriate to - for the consent calendar. By having this language, it's our position that the Legislature explicitly adopted the practice of the consent calendar provided that the family court follows the procedure. And by having a hearing, it provides an opportunity for the People of the state of Michigan to make their objections, that the court makes a determination that this is an appropriate consent calendar case, and then to have the matter reviewed like it was in the *Williams* case. And then going back to the *Williams* case, if there's an abuse of discretion which I believe there was in the *Williams* case, this Court or the lower appellate court can make a decision that there's a abuse of discretion. That's the procedure that the Legislature decided -

JUSTICE MARKMAN: Judge -

JUDGE DOBRICH: in the Crime Victim's Rights Act.

JUSTICE MARKMAN: Judge. Judge can I ask you a question please?

JUDGE DOBRICH: Sure.

JUSTICE MARKMAN: And, again, I'd reiterate as I did before I began questioning Professor Thomas, I've not come to a resolution on this constitutional question; I just think it's the determinative question here.

JUDGE DOBRICH: I agree.

JUSTICE MARKMAN: And that determinative question once again is whether the prosecutor has a constitutional right to bring criminal charges period, or whether the prosecutor has a constitutional right to bring criminal charges and to have such charges determined on the basis of the law as it exists at that

time. That to me at least, one Justice, is the dispositive question here because constitutional questions are always dispositive. I agree that this is a very beneficial process. I hope it can be maintained either in the present form or some modified form. I accept the anecdotal and the other testimony on the part of people who know much more about this process than I do. But to me, the constitutional question is is the prosecutor's right this or is the prosecutor's constitutional right that.

JUDGE DOBRICH: And, obviously, that's why we sent a second response because we agree the separation of powers is the principle issue here. And as a former prosecutor, the fact that I would have appellate review of a decision of a court was very important to me. So if the court disagreed with a position that I took, the fact that we have appellate review as set forth in the Crime Victim's Rights Act to me would eliminate the concern that the family court, which is traditionally remedial in nature as compared to criminal court, was taking an action of putting the matter on the consent calendar. Now I don't - I didn't find any authority in Michigan, but I did attach an Oklahoma case to my letter which dealt with a very similar issue in the state of Oklahoma. And in Oklahoma their supreme court opined that the theory of separation of powers is somewhat blurred when it deals with juvenile courts because juvenile courts are taking in these cases a little bit different than the criminal justice system does because we have an intake procedure and we're deciding whether to divert it or how to handle this case in a more remedial fashion. So we're looking at policy butting up against separate of powers, and I think there is some blurring of the lines. And the fact that if the juvenile is unsuccessful -

JUSTICE MARKMAN: A blurring - a blurring of the lines that has constitutional implication - constitutional implications in your judgment.

JUDGE DOBRICH: I do think it has constitutional implications, that's why we responded in regards to this. I think the distinction in *Genesee I* and *II* was the fact that the court made a decision as to what the final plea would be in that matter over the objection of the prosecutor. They decided to take manslaughter over a case that was obviously a murder case. In the consent calendar example, we have the process of putting this informally, and then if the youth fails back to the formal calendar.

CHIEF JUSTICE KELLY: Are there other questions of Judge Dobrich? If not, we thank you, judge.

JUDGE DOBRICH: Okay. Thank you, very much.

CHIEF JUSTICE KELLY: The third person on our list here is William Bartlam.

MR. BARTLAM: Good morning. May it please the Court. Chief Justice Kelly and Justices of the Supreme Court I am William Bartlam; I have worked in the juvenile justice system for 32 years. I've been an assistant prosecuting attorney, I've been an attorney in private practice, and for the last 25 years I've worked for the trial courts. You are considering two alternatives here today, and I urge you to reject each of them. I am mindful of the discussions that have gone before; I would point out for as long as there have been court rules governing juvenile justice proceedings, since 1969, there has been a consent calendar rule. And when you go back to 1969 JCR 4.3, you will see the consent calendar was distinctly different from diversion, and it has remained that way - consent calendar is not diversion by another name. There is a statutory basis. Justice Markman you've addressed is there a constitutional issue here regarding the prosecutor. I would say to you that the Legislature has given to the judicial branch the sole authority to decide whether a given prosecution will be handled formally or informally, and you'll find that in §11 of the Juvenile Code. The question may be when the prosecutor brings a charge does the prosecutor have the concomitant right to have a formal adjudication in this position on that charge, or may the court resolve that as charged in an informal manner. I would suggest, yes.

JUSTICE MARKMAN: It's not just the formality versus the informality you understand; it's also whether or not the court is restricted to resolving the issue on the basis of the law as it exists when the charges are brought, or on the basis of other factors - in this case, the child's conduct and behavior after the charges have been brought.

MR. BARTLAM: Yes.

JUSTICE MARKMAN: It is not just formality versus informality; it's essentially what is the source of the law on the basis of which the court's going to be making its decision. That's the constitutional issue precisely - the source of the law invoked by the court.

MR. BARTLAM: And for a case to be on the consent calendar, the court must make a finding, whether it is through a plea or other means, that the charges contained in the charging document, petition, bring - would bring this particular juvenile within the jurisdiction of the court. Consent has - it has been mentioned is quite different than diversion in that it is court intense - it is court services, it is court oversight, and it is the court's sole judgment if subsequent events say our initial determination that this be handled informally was wrong we are reconsidering that initial determination and we are transferring this and we will hear it formally. Likewise, to take a case that has been selected and designated to be handled formally and before disposition say we are going to handle this informally, that is based on all of the facts and the circumstances. It is a reconsideration of that initial determination that maybe we didn't get it quite right the first time, but now before we make this position on this case we can handle it in the proper manner. The particular challenges to this - these provisions of this rule were before the Court in 2003 when the last changes to the rule were adopted. They were considered in the public comment and in the hearing, and I would urge that you maintain the rule in its present form and reject both alternative A and alternative B. Thank you.

CHIEF JUSTICE KELLY: Thank you, sir. The last person on this item to speak is Stuart Dunnings III, the Ingham County Prosecuting Attorney.

MR. DUNNINGS: Good morning Chief Justice Kelly, Justices. My name is Stuart Dunnings III. I'd like to apologize for President Peppler who could not be here this morning, they're having a meeting regarding the parole issues of the executive board, and so I was designated to come speak on behalf of the Prosecuting Attorneys Association of Michigan. I'm the Prosecuting Attorney for Ingham County. The Prosecuting Attorneys Association opposes proposal A - I mean we believe that the consent calendar should not be done away with, but we do have some serious concerns regarding the - we believe that B should be adopted. We believe that there is some constitutional issues here. There's more to the prosecutor's obligation and duty than to just file a charge and walk away. Even though the Crime Victim's Rights Act specifies that if a petition is appropriate and meets the standards that the court must accept the petition, the consent calendar affectively allows the court to deauthorize the petition because the court can on its own say we're no longer going to proceed with this case even though we

have probable cause; even though we can bring the case, put in the facts, and meet our burden under the law. Now I'm not going to object - I mean I consent that the consent calendar is a good thing and, quite frankly, it works. None of my colleagues has indicated that the consent calendar does anything but work, but the problem that we have and the reason that I'm here is that all too often the prosecutors are completely out of the process when things are put on the consent calendar. Things are put on the consent calendar normally when the petition first gets to the JCO - the juvenile court officer - they reviewed it, they decide it goes on consent calendar, it's placed on the consent calendar, and we're not aware of it until after the fact - although we do get aware of it. And then we are the ones who have to deal with the victims. We are the ones who usually know more about the incident; we are the ones who've met with the victims. And to not make us part of the process is to deprive the People of the state of Michigan what our function is, and also to deprive victims, in some counties - I'm not saying in all counties - but in some counties their right to be heard prior to the matter being placed on the consent calendar. We believe that - we understand the argument that the Legislature may have implicitly agreed to consent calendar because they have passed statutes which address the consent calendar and speak of the consent calendar, but in point of fact the Legislature has provided for a diversionary scheme for juveniles - 722.821 and the following sections. If we were to be just strict here, we would say that since the Legislature has provided that that is the only way to go and the consent calendar goes too far - has usurped the legislative function. Someone talked about pleas under advisement. We would simply say that court rule 6.301 indicates the prosecutor must consent to pleas if the ultimate disposition is going to be a lesser charge. That is usually the case in pleas under advisement, and so, therefore, pleas under advisement cannot be taken unless the prosecutor consents.

CHIEF JUSTICE KELLY: Are there questions of Mr. Prosecutor Dunnings?

JUSTICE HATHAWAY: Does MCL 780.786(b) require the prosecutor to approve -

MR. DUNNINGS: Approve?

JUSTICE HATHAWAY: approve of somebody being on the consent calendar? It doesn't, does it?

MR. DUNNINGS: No, it does not.

JUSTICE YOUNG: That's why you support proposal B.

MR. DUNNINGS: That's why we support B. Oh, one thing. Someone asked about with respect to assault -

JUSTICE WEAVER: Yeah, I'm gonna ask you - that's the question.

MR. DUNNINGS: assaultive crimes being barred from the consent calendar. I would not be in favor of that. I believe that there are some juveniles that are involved in minor assaults who should not be prevented from being placed on the consent calendar.

JUSTICE YOUNG: And how do you make that distinction?

MR. DUNNINGS: It's a case by case -

JUSTICE YOUNG: No, I mean the statute says what it says.

MR. DUNNINGS: Right.

JUSTICE YOUNG: You think the statute has no bearing on the scope of the consent calendar jurisdiction.

MR. DUNNINGS: I think the statute does.

JUSTICE YOUNG: Well, then how -

MR. DUNNINGS: See the thing is the consent calendar rule as is written is in contravention of the statute.

JUSTICE YOUNG: Well - exactly. I mean - So I guess I'm having difficulty understanding. Your position is the diversion statute is highly relevant about what cases -

MR. DUNNINGS: Correct.

JUSTICE YOUNG: can - should be treated in a diversionary form.

MR. DUNNINGS: Correct.

JUSTICE YOUNG: Nevertheless, I thought I just heard you say notwithstanding I think some cases should still - assaultive

cases that would fall within the scope of the nondiversionary statute should nevertheless be placed on the consent calendar.

MR. DUNNINGS: Well, what we would do Justice Young if we felt that a case of that nature - a case which is essentially assaultive should be - should go on the consent calendar we just charge something else.

JUSTICE YOUNG: Right. But - I mean I understand; that's how the prosecutor can avoid it. But if the prosecutor has made the charge of the assaultive crime that falls within the nondiversionary statute, then I'm not sure I understand your point that nevertheless it can go into the consent calendar.

MR. DUNNINGS: No. If the prosecutor says I'm charging this assault, it's gonna stay as an assault -

JUSTICE YOUNG: Right.

MR. DUNNINGS: then it's not subject to that. I guess I -

JUSTICE YOUNG: Okay. Well, how does -

JUSTICE WEAVER: You just change the charge, right?

JUSTICE YOUNG: How should B - alternative B as published be amended? I thought you were saying I like B, but there's some change that needs to occur to it.

MR. DUNNINGS: There was the discussion about the assaultive part of B - alternative B, and I was thinking more in practice what do we really do. What we really do -

JUSTICE YOUNG: But I'm asking - we've got a - we've got a rule that we've published, my question is are - is the prosecutorial association or you individually asking that B be amended or enacted as it was published.

MR. DUNNINGS: Well, B should be enacted as published; we work around that.

JUSTICE WEAVER: So you actually - representing the prosecutors - want every consent calendar case for the prosecutor to be informed about it, and have a veto of it, or just be informed about it.

MR. DUNNINGS: We believe as a practical - as a constitutional matter we believe we have a veto power because we believe that is part of the prosecutor's role. No where else in the criminal justice system when we file a case can the court on its own - if there's you know the law - if we have the facts, there's no where else that the court can just dismiss the case because they feel it's the best thing to do. That's how we feel constitutionally.

JUSTICE YOUNG: And might I add your tie is very, very sartorially splendid.

MR. DUNNINGS: Thank you, very much.

CHIEF JUSTICE KELLY: If there are no other questions - if you'd like to stay at the podium sir we'll move on to the next item.

JUSTICE MARKMAN: Chief Justice can I -

CHIEF JUSTICE KELLY: Were there questions? Sorry.

JUSTICE MARKMAN: Yeah. Mr. Prosecutor I respect your opinions very much on this, and in reading the submission of the Prosecutors Association and hearing you today and learning of your support for alternative B, I haven't seen much focus on the constitutional underpinnings of that. You've indicated you think the prosecutor should be involved in this process, and PAAM seems to accept the same basic premise. Is there any constitutional underpinning in your judgment to the right of the prosecutor to be involved in this process, or is it simply a matter of good policy - good public - good public procedures, or it is there some constitutional component to your perspective?

MR. DUNNINGS: I cannot cite anything specific on the ruling with respect to that; the closest I could come was this Court's decision in the case which was previously decided, *People v Williams*. No where else in the criminal justice system - there's not a separate Constitution for juveniles - would anybody contemplate that once a criminal case has been charged, and once we've met our burden of probable cause, the case could be dismissed or resolved without the participation of the prosecutor.

JUSTICE MARKMAN: Thank you.

MR. DUNNINGS: I hope that answers your question Justice.

CHIEF JUSTICE KELLY: If there are no other questions, we'll move on to 2008-38 in which you'd also like to make comments, and that involves whether to publish for comment an amendment of MCR 6.201 as submitted by the Representative Assembly of the State Bar of Michigan that would require prosecutors to preserve electronic recording evidence of governmental agencies, and which would entitle a defendant to a jury instruction that evidence not produced can be presumed to have been adverse to the prosecution.

JUSTICE YOUNG: I believe it's to adopt - haven't we published this already.

CHIEF JUSTICE KELLY: I'm sorry. We did publish it for comment.

ITEM 4 - 2008-38 - MCR 6.201

MR. DUNNINGS: Actually that was the rule that caused the Association to ask me to be here today. They only told me about the other two rules yesterday. We are very much opposed to this. Prosecutors are not charged with the preservation of evidence in the criminal justice system; it's not some - it's not a function that we operate. The police hold the evidence. When it's time for court they bring it to us, we share it with the defense you know as we get it - if it's exculpatory we turn everything over when we get it. After the trial is over - things are marked into evidence, after the trial is over it is returned to the police agencies and we don't think about it any - We do not have the capability of doing this. Ingham County is in the process of going paperless -

JUSTICE YOUNG: Is it just a matter of capability, or is it authority? Does the prosecutor have - does the prosecutor own the evidence?

MR. DUNNINGS: No, sir, we don't. Once - our contention is once it's admitted to the court it's the courts, but normally the court then at the end of the trial says okay, I want you to go through your exhibits and defense you take your exhibits and prosecutor you take your exhibits, and then we turn it back over to the police agencies. It's the police agencies that actually hold the evidence.

CHIEF JUSTICE KELLY: Well, this would change that rule, and that would say that the prosecutor has to get possession and

control of that after the trial's over and hold onto it until the appeal's over, right?

MR. DUNNINGS: Yeah, and our position - First of all, we don't have the capability. As I was saying, Ingham County's in the process of going paperless, and one of the things that we've come up against just recently is what do we do with the - these electronic media, videos, recordings, take up a lot of space on a server, and we're having problems even sending these things electronic - for electronic discovery because of our county IT security policy or something. Our county IT department is talking about charging us per gigabyte - charging our office per gigabyte that we store on their servers which means if we are charged with keeping all of this information, which takes up a large amount on our servers, that's something that we're gonna end up having to pay for. And the other thing -

JUSTICE YOUNG: I'd like to - you're responding to the practical issues. I'd like you to address the implicit assertion and the Chief Justice's question to you is - her assertion was but this rule changes who owns the evidence. My question to you is a legal one. Can this Court instruct another branch of government to - as to how another branch of the Executive government shall conduct itself? Do we have the constitutional authority to direct the prosecutor, an Executive Branch function, to in turn take over the Executive Branch function of the police departments?

MR. DUNNINGS: I believe that the Court has the authority to say you shall preserve this evidence until such time, but I think how we do that is our business.

JUSTICE YOUNG: Once it comes into your possession.

MR. DUNNINGS: Correct. I don't know - the other thing is the defense has a copy. Why is the defense not given the burden of keeping their own evidence because it's been admitted in court, they have a copy of what we have, why should the burden of maintaining it be placed on us to the extent that if it gets lost for whatever reason we get a negative jury instruction when the defense has possession of the item just as we do.

CHIEF JUSTICE KELLY: Other questions? Thank you, sir.

MR. DUNNINGS: If I may ask the Court's indulgence. With respect to the plea bargain rule, I didn't think to sign in for

that; I didn't realize this was up. We strongly oppose the requirement that all plea negotiations be placed on the record.

JUSTICE CORRIGAN: Mr. Dunnings I'll say for myself I apologize to everyone, the wording of that was really wrong. I mean it would be ridiculous that all plea negotiations would be on the record. I think the intent - at least my intent in voting for that was when the court is involved that that be on the record because the problems that we see subsequent are so grave. So - but the wording is wrong.

JUSTICE YOUNG: Does that change your position? If we're - what we're talking about is a Cobbs plea.

MR. DUNNINGS: I reviewed the comments that were submitted on that rule, and I happen to come from a county where, as you know, one of our circuit judges, former judge Beverly Nettles-Nickerson, egregiously participated or directed plea negotiations. So that may be one of the things that brought it to your attention. But even given that, I'd still be hesitant to say that every plea discussion involving the court be on the record because there are things that go on in those discussions - reasons why we might want to do this or that - that we wouldn't want on the record. It could compromise informants' safety, we might be saying things in - about the strengths of our case that we wouldn't want to be public particularly if we have co-defendant cases. Yes, there have been abuses, and my office suffered greatly as a result of one abuser. But even given that experience, I still would be hesitant to say that all discussions involving the court be placed on the record.

CHIEF JUSTICE KELLY: Well, now you got a three-for, huh. Thank you, sir.

MR. DUNNINGS: Thank you.

JUSTICE CORRIGAN: As long as he's here Chief, can I ask him one more question?

CHIEF JUSTICE KELLY: By all means.

JUSTICE CORRIGAN: I'm sorry. This is on something you may not be familiar with, and I don't think anyone signed up to talk about it.

JUSTICE YOUNG: The PSA - PSR.

JUSTICE CORRIGAN: It's on the - are you aware that we're taking up the presentence reports being accessible two days before -

MR. DUNNINGS: Yes, I did read that; I did read that.

JUSTICE CORRIGAN: One concern that I have with the published proposal is that now it's gonna let copies be freely out there instead of the legislative version, and it seems to me that the same concerns you have in the plea bargaining context are there. If the pre can now be out on the street, don't you prevent candor with the court, don't you worry about informant safety, don't you worry about informed sentencing decisions if we're letting the presentence not be confidential and not be privileged anymore.

MR. DUNNINGS: Since you asked Justice Corrigan -

JUSTICE YOUNG: You want to touch that softball.

MR. DUNNINGS: Yeah. We agree with the part of the rule - I haven't talked to my colleagues so I'm speaking for myself, but I think I have the sense of the group, that we would certainly agree that it should be made available two days prior to the sentencing, that's a problem, and that causes sentencings to be adjourned, and we certainly support that portion of the rule. But the part where it should become public, I think would give all of our members great pause and I personally would not support that.

JUSTICE YOUNG: Well, let's - I think that the gist of it is what's the problem; why not let it be public. And I think that's - that's - I think an important thing for us to understand what is potentially put at risk if these presentence reports become a public document, notwithstanding the fact that the Legislature says they're confidential.

MR. DUNNINGS: There's information in the presentence report about victims, about victims' families, about defendant's families, these are things which are not covered in court. There's information in there which is not brought to the court's attention during the trial so therefore it would not otherwise be public. Oftentimes there's information there that would not even be in the police reports which we would submit wouldn't you know be subject to FOIA after a guilty - or after a decision is made by the court. And there's information in there regarding victims - I suppose if you wanted to put a rule in there

requiring us to redact information you could do that. But there's a great deal of information that really doesn't pertain to the guilt or innocence of the defendant. There could be private information regarding medical treatment that a victim has had to have, psychological treatment which a victim has had, that really there's no business it being in the public.

JUSTICE YOUNG: What does it mean to be made available then?

MR. DUNNINGS: Normally what happens is people go to the court or go to the probation department and they -

JUSTICE YOUNG: Look at the file; look at the -

MR. DUNNINGS: review the report and make notes.

JUSTICE YOUNG: Now on - on the premises.

MR. DUNNINGS: Right - or they will review it on the premises or review it with their client, but it has to be returned to the court and it says you can't make copies. So - in our county anyway, a defense attorney comes, he can pick it up, he can take it, but it's clear you do - you may not copy this. He can take it to the jail or meet with his client in his office, review the presentence report, but at the end of the session, at the sentencing, the reports have to be turned back in. Even now, if I want I presentence report because I want to make a comment to the Department of Corrections or the Parole Board, I have to go down to probation and get another copy; and I don't think that's onerous.

CHIEF JUSTICE KELLY: Okay, thank you, sir.

JUSTICE MARKMAN: Mr. Dunnings before - you almost got away. Let me return if I can very briefly to MCR 6.201 if I can.

MR. DUNNINGS: Which one - that's the evidence rule.

JUSTICE MARKMAN: Yes.

MR. DUNNINGS: Okay.

JUSTICE MARKMAN: I understand your concern about the adverse jury instructions and I understand your concern about the preservation requirements, but do you disagree with the core

language that would impose a responsibility upon the prosecutor to share with the defendant "electronic recording evidence made by any governmental agency pertaining to the case known to the prosecuting attorney"?

MR. DUNNINGS: No, I have no - I have no objection - I think that's the way it should be. That's the way -

JUSTICE YOUNG: Whether it's exculpatory or not.

MR. DUNNINGS: I give over everything because I don't know what might be exculpatory. I mean I might have a report which supports the credibility of an otherwise uncredible defense witness, and there's many uncredible defense witnesses, but you know I might have a report that supports this credibility that to me as prosecutor I would not recognize it's exculpatory. But in the overall scheme of things it is, and so we don't review what we get to determine whether it's exculpatory or not. We turn over everything.

JUSTICE MARKMAN: So if you're aware of some such evidence in the possession say of the Department of Transportation, you would share that with the defendant.

MR. DUNNINGS: We turn over everything that we get.

JUSTICE YOUNG: Well, is - but that's your practice. My question of - this imposes the obligation for you to scour the face of government and determine whether they do or do not have evidence.

MR. DUNNINGS: I thought the rule says if known to the prosecutor.

JUSTICE MARKMAN: Yes, I don't know that it imposes an affirmative scouring obligation.

MR. DUNNINGS: Right. I'd say if - that language is very important Justice Young -

JUSTICE YOUNG: Okay.

MR. DUNNINGS: if known to the prosecutor.

JUSTICE YOUNG: All right.

MR. DUNNINGS: If it comes to our attention, if we're made aware of it, then we have - absolutely have an obligation particularly if it's exculpatory under *Brady* to turn it over. But it's just my practice is - I mean as a former defense attorney, some of you may not remember that I did that, I - I want everything because how else am I gonna adequately prepare.

JUSTICE MARKMAN: So - so just that there's no confusion I'd like to follow up on Justice Young's question. You not only have adopted that as your own practice, but you favor imposing that obligation upon prosecutors throughout the state.

MR. DUNNINGS: If - no.

JUSTICE MARKMAN: No.

MR. DUNNINGS: If it's exculpatory, it should be turned over.

CHIEF JUSTICE KELLY: Okay.

JUSTICE MARKMAN: Thank you.

CHIEF JUSTICE KELLY: Thank you.

MR. DUNNINGS: Thank you, good day.

CHIEF JUSTICE KELLY: Good day. The next item for public comment is 2008-43 which involves proposed amendments which would incorporate provisions of the Indian Child Welfare Act into specific provisions regarding the guardianship and adoption rules. And speaking today will be Matthew Fletcher. Good morning, Mr. Fletcher.

ITEM 6 - 2008-43 - MCR 3.800 etc.

MR. FLETCHER: Good morning. My name is Matthew Fletcher; I teach over at Michigan State University College of Law, and I'm the director of the Indigenous Law and Policy Center. The Indian - American Indian Law Section of the State Bar asked me to present short testimony on a fairly narrow question involving these court rules that are - that are proposed. And the question involves an interpretation of 3.967(A) as well as a short staff comment that accompanies it. As you probably know, the American Law Standing Committee which is - we work pretty closely with the Section - made two recommended amendments - suggested some amendments to this rule, and suggested this staff

comment that the Section - as I'm trying to keep both the Committee and the Section separate of course - the Section certainly supports both of those recommendations. After the comment period expired, the Michigan Probate Judges Association filed a short concern about both of these suggested amendments. The amendment to - or the proposed amendment to 3.967(A) calls for a reduction in a number of days that a hearing is supposed to - that a process is supposed to be concluded from 90 days to 45 days. That the 90 day process - the 90 days comes from what we know as the BIA Guidelines - The Bureau of Indian Affairs Guidelines for state courts published back in 1979. The Committee proposed reducing the 90 days, which is as you know over 30 years old, to 45 days which I think is probably more in line with the realities on the ground, and we certainly support that. We think that the Probate Judges Association concerns are relatively easily assuaged. The first concern relating to the 90 days and/or the 45 days from Judge Anderegg was under the - I suspect was under the impression that no such deadline is actually necessary whatsoever, and, in fact, suggested in his comment that all of this will be done in 14 days and so no such additional time is necessary. And I will defer to Mr. Brooks who will be speaking on behalf of the Committee largely to discuss this issue, but my suspicion is and you can see in our comments that there is a confusion about what a removal hearing is under 3.967(A) and a dispositional review hearing under 9.374(C). And also a - the 9. - the 3.972(A) 63 day trial deadline. And we're finding that the recommendation of the Committee likely is related to ICWA - the Indian Child Welfare Act mandated determinations that have - require a higher standard of review as well as finding and taking testimony from a ICWA - or an American Indian approved expert. On the staff comment proposal which is a slightly different issue, this involves what are known I guess as dual wardship cases where a child is arrested or subjected to the system in someway in a delinquency case. And as ICWA states and we apply state in this context, if the delinquency case is a status offense such as truancy for example, then ICWA will apply and then there will be the higher standards. If it is a nonstatus offense such as just simply direct drug dealing for example, then ICWA won't apply and then we go through the regular process. The concern here I think for the Committee is not any substantive change whatsoever, but more so a concern nationally and also a little bit on the ground here in Michigan that some of these cases sort of evade ICWA's reach a little bit largely out of the sense of there's a focus I think on the delinquency proceeding and ICWA is often forgotten. And there was a - recently a South Dakota task force on the Indian Child Welfare Act that went into great

detail about how this can actually happen, noting that there were several instances of that case statistically speaking that they would like to avoid. And so I think that's the sense of the staff comment is to - just to have a little place marker for that to avoid that problem. Thank you.

CHIEF JUSTICE KELLY: Thank you. Questions? Thank you, sir.

MR. FLETCHER: Thank you.

CHIEF JUSTICE KELLY: Next is William Brooks. Good morning Mr. Brooks.

MR. BROOKS: Good morning Chief Justice. My name is William Brooks; I am the current chair of the State Bar of Michigan Standing Committee on American Indian Law. It is my honor to be here this morning to represent that Committee before this Court. I first want to acknowledge the work that the Indian Child Welfare subcommittee put into what - developing the rules that you have in front of you that were put out for public comment. The subcommittee that developed these proposed rules was comprised of staff from the Supreme Court Administrator's Office, a broad section of both tribal and state court judges, state and tribal court prosecutors, tribal attorneys, and practitioners in this area. And I think the paucity of the comments that the Court received on these proposed rules reflects the broad support that there is for these rules. As a practitioner and the discussion within the Committee indicated, we believe that these particular rules are long overdue here in Michigan. A lot of the time that practitioners put into - both the attorneys representing parties, the prosecutors, and the judges who are handling these cases spend I think too much time trying to figure out what ICWA requires in the context of the Michigan court rules and how they manage the process to assure compliance with the Indian Child Welfare Act. The rules that you have in front of you will eliminate that, and then the court proceedings will focus on what it need - what they have to do to protect the best interests of children as opposed to procedure. The comments that were submitted on behalf of the Indian Law Committee, and I do want to point out as well that the membership of the Indian Law Committee itself is comprised of a cross section of state and tribal court judges, state and tribal court prosecutors, tribal attorneys, and practitioners who represent children on the Legal Aid & Defender Association, as well as legal service attorneys who represent child and Indian parents in these cases, and so the perspective of the committee

also represents that broad section. The Committee only had two comments on the proposed rules. The first comment really reflected some of the difficulties with trying to integrate the procedural requirements of the Indian Child Welfare Act into what is currently in the Michigan court rules. The Indian Child Welfare - and the issue is specific to what are called protective custody or emergency removals - the Indian Child Welfare Act has two sections that address that particular subject. One - §1922 of the federal statute deals with Indian children who are residents of a reservation, who are temporarily off reservation, and only allows those children to be taken into protective custody under emergency placement to either protect or to prevent imminent physical damage to the child. Secondly, §1912 of the federal statute only permits state courts to remove an Indian child from their parent or custodian if certain evidentiary standards are met including a - evidence that active efforts have been provided to the parent or custodian to prevent the removal and address the causes of removal, and secondly, that there's clear and convincing evidence that those efforts have failed and that removal of the child from the home is necessary to prevent serious emotional or physical harm. The court rule at issue is really an attempt to try to reconcile that - the requirements in ICWA - ICWA does not specifically address these temporary emergency removals, and the rule was an attempt to set some sort of a time limit on those emergency removals. The proposed court rule is based on the BIA Guidelines which do recognize that courts can make a temporary emergency removal for up to 90 days. Those BIA Guidelines are not binding on any courts, and it's the belief of the Committee that 90 days is too long, that as a practical matter the removal hearing that is contemplated by proposed rule 3.967 can be - can be completed within 45 days, and virtually all cases - and that the necessary findings that the Indian Child Welfare Act requires can be made within that time period, there is an exception for the extraordinary circumstances. As we indicated in the supplemental comments that the Committee submitted in response to the opposition from the Probate Judges Association, the difference in position we believe is more form over substance. The Probate Judges also agree that a removal hearing is required, the Probate Judges agree that removal hearing will typically be held within 14 days after the emergency removal, and that the emergency removal hearing will include evidentiary findings that conform to the requirements of the Indian Child Welfare Act. The only question really is whether the time that a child can be left in an emergency or temporary placement absent those - absent those findings will be 90 days or 45 days, and, again, the Committee believes that consistent with the

Indian Child Welfare Act that states that removal has to be based on those findings that despite what the BIA Guidelines say that is more consistent with the intent and the text of the Indian Child Welfare Act to make that time period 45 days as opposed to 90 days.

The second area of concern that the Probate Judges Association raised was in response to a comment from the American Indian Law Committee, and this particular issue was the subject of a lot of discussion and debate during the process of developing the proposed rules. And within the Indian Committee itself, and the recommendation was to - and that has to with what, and as Professor Fletcher indicated, that oftentimes cases that are filed as delinquency matters with a nonstatus offense have a way of morphing over time into a situation where the focus of the case is not so much on keeping the child out of the home because of conduct, but keeping the child out of the home because of the parents inability to parent the child in the home. And the purpose of the staff comment and the definition of a child custody proceeding, again as Fletcher - Professor Fletcher indicated, is more to be there as a signpost or a prompt for both the court and the parties before the court to think about that issue that whether they need to - the prosecutor or the Department of Human Services that hey, you need to now file a neglect petition because that's what this case is about, or for the court to prompt the parties to do so. The - you know we believe that the concerns of the Probate Judges Association that this will somehow force courts to make ICWA findings to maintain an out-of-home placement in a nonstatus delinquency case is misplaced, that nothing in the staff comment you know would force the courts to take that kind of action. Again, it's more of a guidepost to ensure that - and to insist both the parties and the courts to be advocates to ensure that the Indian Child Welfare Act is being complied with. Thank you.

CHIEF JUSTICE KELLY: Thank you. Questions? Thank you, Mr. Brooks. The last item for our public hearing is 2009-26, and these are proposed changed to Chapter 5 of the Michigan court rules to provide consistency with the language and procedures found in new substantive rules of the Michigan Trust Code. And speaking before us will be the Honorable David Murkowski, who's a probate judge from Grand Rapids -

JUSTICE YOUNG: And also very well dressed today I might add.

MR. MURKOWSKI: How observant.

CHIEF JUSTICE KELLY: and council member, right, of the Probate & Estate Planning Section of the State Bar, and also the Probate Judges Association chairperson of your subcommittee, right?

ITEM 10 - 2009-26 - MCR 5.101 etc.

MR. MURKOWSKI: Correct. Good morning, thank you. I guess I have two hats on today. Ms. Marlaine Teahan who actually shepherded the proposed amendments is present here to speak with you also. Good morning Chief Justice Kelly and Justices. We are here at administrative hearing - apparently I think this will be perhaps the least contentious item on the Court's agenda this morning. These court rules were promulgated as a reaction and to address the Michigan Trust Code that has been passed by our Legislature by unanimous vote both in the House and in the Senate. That legislation goes into affect April 1st of this year, and these changes to the proposed court rules are strictly procedural in nature, and are conforming to the legislation. Our goal and I believe it was addressed by the Justices at the administrative hearing was to ensure or if we could that the commencement of the legislation and the commencement of the court rules coincided at April 1st, and I believe the Justices have - you have made that accommodation to us although I think the comment period may continue on, but that the rules would indeed commence as their effective date as April 1st. So we are delighted that we were able to work with both the State Bar section and diverse groups from the Michigan Bankers Association and the Attorney General's Office both with the legislation and the court rules to promulgate these rules knowing there are no substantive changes in these rules, and that they are truly conforming and procedural in nature.

CHIEF JUSTICE KELLY: Any questions? So you don't anticipate that after the first that we'll get any public comment that's gonna cause us to rethink this.

MR. MURKOWSKI: None. I don't believe that will happen; I think there were three comments posted on the Court's website. One from the Probate & Estate Planning Bar Section, one from the Michigan Probate Judges Association, by our president Judge Dobrich, who was here this morning on other matters, and I think one deferring letter I think perhaps from the Michigan Judges Association -

JUSTICE WEAVER: But no position.

MR. MURKOWSKI: who defer to our apparent wisdom.

CHIEF JUSTICE KELLY: Okay, thank you, sir.

MR. MURKOWSKI: Thank you, very much.

CHIEF JUSTICE KELLY: Our last speaker is Marlaine Teahan who's also a council member of the Probate & Estate Planning Section of the State Bar.

MS. TEAHAN: Good morning Justice Kelly, Justices. I'm very pleased to be here. May it please the Court. I'd like to address you on these changes to Chapter 5 of the Michigan court rules. I am a member of the council of Probate & Estate Planning Section of the State Bar; I'm also a member of the Michigan Trust Code drafting committee, and as Judge Murkowski mentioned I am the chairperson of the rules committee that worked with the Michigan Probate Judges to put these rules together for its consideration. I'm required by the State Bar to disclose to you that I am here on behalf of the Probate Council not on the State Bar - on behalf of the State Bar. I've supplied Mr. Davis with that written disclosure; I'd ask that your honor make it part of the Court record. I thought it would be interesting if the Court knew the guiding principles that guided us in putting these rules together. As Judge Murkowski indicated, they were just to preserve Michigan law; to make sure that the procedural rules matched the substantive rules. So that I think will give your honors comfort in considering these rules. We also decided that we wouldn't draft a court rule just because the Michigan Trust Code Section talked about being in court if the Michigan Trust Code adequately dealt with the procedure that would be in the court process. So we didn't want to make a rule just because we're finding ourself in court. The other thing that was a guiding principle, and I will try to do this today, is we tried to use as few words as possible. So my purpose in being here today is two-fold; to urge the Court to adopt these rules and to urge the Court to make them effective April 1st. It's very important that the procedural rules be put into place at the same time as the substantive rules. And one other thing that I think is really important for you to know is that the Probate Section is a large section, we have over 4,000 members. The Probate Council is a very proactive council and we have the ability to send an email to every council member who has an email address. So if these rules are adopted and effective April 1st, we will be sending out an email to every

section member; we will do our best to get the word out. In addition, the Institute of Continuing Legal Education had a seminar last week in Grand Rapids attended by more than 300 of the Bar members, and next week they will - excuse me - next month in Plymouth over 400 members will be attending a Michigan Trust Code seminar.

JUSTICE YOUNG: Do you think it likely that any practitioner in this area is unaware of these rules?

MS. TEAHAN: At this point I think there is a possibility that they're unaware of them.

JUSTICE YOUNG: They're unaware of this new statute then too.

MS. TEAHAN: Well, I think that would be unlikely because this has been a process that's been going on since 2003.

JUSTICE YOUNG: You just think that our - they would not be looking to the Court to implement rules to go along with the statute.

MS. TEAHAN: Well, I think any probate practitioner that goes to court regularly is trying to keep aware of the status of the court rules.

JUSTICE YOUNG: Okay.

MS. TEAHAN: So I think - that's a good question. I really doubt that it will come as a surprise -

JUSTICE YOUNG: But there will be a burst of publicity after - if we approve these rules for an effective date of - the same effective date as the statute, so you don't anticipate that anybody who actually might need them would be unaware of them.

MS. TEAHAN: That's right. And the Probate Section has been working on the rules since last May, and at every monthly meeting it's been discussed, it's been on the State Bar's section web page, all the minutes - I think the word is getting out to those practitioners who are in court. So I would like to just conclude my remarks by thanking the Michigan Probate Judges Association. I'd like to thank Judge Dobrich for her letter in support, and most particularly Judge Murkowski for helping us get this passed with his Association. I'd like to thank the Court for kind of condensing the time frame that you usually use

in implementing new rules. I think it's very important, and we appreciate that. And I would also like to thank Anne Boomer for her advice, and she really helps make this process work a lot more smoothly. If you have any questions?

JUSTICE WEAVER: Thank you.

MS. TEAHAN: Thank you, very much.

CHIEF JUSTICE KELLY: Thank you, Ms. Teahan. That concludes our public hearing.